

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICIA L. LESTER

Claimant

VS.

**BLESSED TRINITY HOME
HEALTHCARE, INC.**

Respondent

AND

WESCO INSURANCE CO.

Insurance Carrier

Docket No. 1,045,816

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 17, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Bart E. Eisfelder, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant had suffered a minor aggravation of a preexisting back condition at work on March 17, 2009. However, the ALJ found that a non-work related event that occurred two days later further aggravated the condition to the point where claimant could not work and required medical treatment. The ALJ denied claimant's request for temporary total disability benefits, finding that she was not temporarily totally disabled on account of the work injury of March 17, 2009. Further, the ALJ denied claimant's request for payment of medical services provided after March 17, 2009, as well as claimant's request for reimbursement of Dr. Prostic's bill as unauthorized medical expense.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 16, 2009, Preliminary Hearing and the exhibits, including Respondent's Exhibit D, the transcript of the deposition of Alice Moore taken November 9, 2009, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends that she sustained an accidental injury that arose out of and in the course of her employment with respondent on March 17, 2009, and that the March 19, 2009, incident at home should not be found to be an intervening injury.

Respondent argues first that the Board does not have jurisdiction over this appeal from a preliminary hearing because claimant did not raise an appealable issue and because claimant failed to allege the ALJ exceeded his jurisdiction in issuing a preliminary order denying the relief requested at the preliminary hearing. In the alternative, respondent requests the preliminary hearing Order of the ALJ be affirmed.¹

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issues in this appeal?

(2) If so, is claimant's current need for temporary total disability benefits and medical treatment the result of a personal injury by accident that arose out of and in the course of her employment at respondent?

FINDINGS OF FACT

Claimant worked full time for respondent as a home health registered nurse. As of March 17, 2009, she was working on the wound care team. She admits to having had back problems in the past. In 2001, she had a microdiscectomy at the lumbar level. She testified that she had general backaches from the time she started working at respondent up through March 17, 2009. She was taking Lortab and Flexeril on an as-needed basis. Her prescriptions were monitored by Dr. LeAnn Detar-Newbert, her primary care physician. She saw Dr. Detar-Newbert on March 16, 2009, at which time she was diagnosed with bronchitis and "LBP."² Claimant, however, testified that she did not remember that she complained of low back pain to Dr. Detar-Newbert on March 16.

On March 17, 2009, claimant was seeing her first patient of the day and was performing wound care lymphedema wraps for the patient. In doing so, claimant was first kneeling and leaning forward and then sitting on the floor and leaning forward in front of the patient. She had to remove the patient's lymphedema wraps and dressings, cleanse her wounds, redress the wounds, and then put the lymphedema wraps back on. This activity took her about 30 to 45 minutes. Claimant testified that her back became fatigued

¹ Respondent argues in its brief that the ALJ's order should be affirmed because it is based on substantial competent evidence. (Resp. brief filed Feb. 12, 2010, at 8.) The Board's standard of review, however, is de novo.

² P.H. Trans., Resp. Ex. C at 1.

and painful while she was on the floor. She stated that although she changes dressings on a daily basis, she did not usually have to be on the floor to take care of a patient, and the procedure normally lasts only 10 to 15 minutes.

Claimant continued to work her entire shift until about 5 p.m. She took Lortab and Flexeril because she felt increased pain. The more patients she saw, the more her pain increased. By the time she got back to the office, both the administrator and the director of nursing were in a conference, so she did not report the injury that day. She went to work the next day, March 18, where she attended a staff meeting and saw three or four patients. Claimant testified that on March 18, she told Alice Moore, respondent's owner/administrator, and the Director of Nursing that after sitting on the floor with a patient the day before she developed severe low back pain that went down both her legs. She also told Ms. Moore that she was suffering from bronchitis. She said that Ms. Moore told her to take two days off of work.

Claimant saw one patient on March 19, and that was the last day she worked. She said her back pain that morning was less because she had not been to work and had taken pain medication the night before. The patient she saw on March 19 had extensive wounds and she was again required to excessively lean over to remove his dressings, clean his wounds and reapply the dressings. After seeing the patient, she went home. She took off her shoe, and as she was taking off her sock she felt a pop in her back.

On Sunday, March 22, claimant went to the emergency room complaining of pain in her left knee. She said it was hard for her to walk up and down steps and she felt like her knee was going to give out. The pain was coming from her back. Claimant testified that she told the emergency room personnel that her pain started on March 17 while working with a patient and that she had also felt a pop in her back on March 19. The emergency room report dated March 22, 2009, gives a history that claimant's chief complaint was chronic back pain with "Onset about 2 days ago" ³ It further notes that "Patient denies an injury." ⁴ The record does not mention the incident while changing a patient's dressing or the incident when claimant took off her sock.

At the suggestion of the emergency room personnel, claimant saw Dr. Detar-Newbert on Monday, March 23, where she said her low back began to ache after she applied wraps to a patient's legs. Claimant said the pain increased the next day with radiation into her left buttock and thigh. Dr. Detar-Newbert prescribed more pain pills and Flexeril and ordered an MRI. Claimant was referred by Dr. Detar-Newbert to Dr. S. R. Reddy Katta for pain management. She saw Dr. Katta on March 26, 2009, giving a history

³ P.H. Trans., Resp. Ex. B at 1.

⁴ *Id.*

of chronic low back pain.⁵ On the accident/injury form claimant filled out, she indicated that the injury occurred while she was at home when she reached down to remove her socks and felt a pop. Dr. Katta's progress note, however, indicates that claimant said her current problem started when she helped a patient wrap his legs and then felt an aching sensation in her back. After seeing Dr. Katta, claimant called respondent and asked to submit her claim to workers compensation. Claimant was later referred by Dr. Detar-Newbert to Dr. Frank Holladay, who performed surgery on claimant's low back on June 1, 2009.

Alice Moore testified that claimant had taken off work several times for back pain, but she had never been placed on light duty before March 17, 2009. Ms. Moore testified that on March 18, 2009, claimant attended a staff meeting. Claimant had been tearful in the meeting and was visibly upset. When the meeting was over, claimant went to Ms. Moore's office. She was crying and coughing. Claimant had been sick with bronchitis, and Ms. Moore said her respiratory status was bad. Claimant told Ms. Moore that her chest and back were killing her. Ms. Moore testified:

And I said, 'um, what, is your back bothering you again? And she said it's just the bronchitis. I've been coughing and coughing. If I could stop coughing I would, you know, not hurt. . . . And then during the conversation she did say, . . . yesterday whenever I was doing Ms. Cox's dressing my back was hurting and I said, well, we need to make out an incident report then. She said, no, it's nothing new. It's the same old back pain I always have, and I'm— I can quote it. I have my notes that are in there but I'm just kind of going off what I remember. Um, "the same old back pain, and if I could just rest, then I could be better."⁶

Ms. Moore then told claimant to take a couple days off to get some rest. Claimant transferred all her patients to other nurses except one. It was claimant's decision to see that one patient on March 19. Claimant came back to see Ms. Moore after seeing the patient on March 19 and said her chest and back were still hurting, although her back was better than the day before, and asked if she could go home, and Ms. Moore agreed to let her go.⁷ At some point after that, claimant spoke with respondent's director of nursing concerning vacation and sick leave balances and short and long-term disability. On March 25, claimant was told that neither long nor short term disability would be available to her. On March 28, claimant called and said she needed to pursue this as a workers compensation injury.

⁵ According to Dr. Katta's note of March 26, 2009, claimant had previously seen him for problems with chronic low back pain.

⁶ P.H. Trans., Resp. Ex. D (Trans. of Alice Moore Depo.) at 11-12.

⁷ *Id.* at 13-14, 19.

On November 23, 2009, claimant was examined by Dr. Edward Prostic at the request of claimant's attorney. After taking a history of claimant's injury and performing a physical examination, Dr. Prostic opined that claimant sustained injury to her low back on March 17, 2009, and required surgery. Dr. Prostic recommended claimant have cortisone injections, stretching exercises, and anti-inflammatory medication, as well as be put on a therapeutic exercise program. He recommended she return to light duty employment. The latest work release form signed by Dr. Holladay indicates that claimant's return to work date was unknown.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2009 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,⁸ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and

⁸*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁹ Whether a claimant's current need for temporary total disability benefits or medical benefits arise out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁰

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹¹ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹² An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁴

⁹ K.S.A. 2009 Supp. 44-501(a).

¹⁰ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹¹ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹² *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹³ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹⁴ K.S.A. 2009 Supp. 44-555c(k).

ANALYSIS

Respondent contends that the Board is without jurisdiction to consider claimant's request for preliminary benefits because the ALJ determined claimant did suffer personal injury by accident on March 17, 2009, that arose out of and in the course of her employment with respondent. The ALJ denied medical and temporary total disability compensation, however, because he found claimant suffered an intervening injury. As such, claimant's current need for benefits is not a direct consequence of her work related accident but, instead, resulted from her subsequent non-work related injury. This question of causation as to whether the medical treatment claimant received and her inability to work after March 19, 2009, resulted from the March 17, 2009, accident at work or the March 19, 2009, accident at home gives rise to a disputed issue of whether the workers compensation benefits claimant is seeking are for an accident and injury that arose out of and in the course of her employment with respondent. Pursuant to K.S.A. 44-534a, this is an issue that the Board has jurisdiction to consider on an appeal from a preliminary hearing order.

The ALJ determined:

The supervisor's testimony about the claimant not treating the March 17 incident as anything significant rings true. The claimant did not immediately seek medical attention, but went to the emergency room five days later only after having had another non-work incident where she felt a pop in her back. It looks like the March 19 incident at home was where the claimant's back pain started escalating to the point she needed medical attention. She was in the emergency room 2 days later for back pain that started 2 days previous.

The claimant had a relatively minor aggravation of pre-existing back pain in the course and scope of her employment on March 17. However, a later, non-work related event further aggravated the condition to the point the claimant could not work and required a repeat surgery. The claimant has not been temporarily totally disabled on account of the work injury, so her request for temporary total benefits is denied.¹⁵

Based on the record presented to date, this Board Member agrees with the ALJ's analysis and finds his Order should be affirmed.

CONCLUSION

- (1) The Board has jurisdiction over the issues in this appeal.
- (2) Claimant's need for medical treatment and temporary total disability compensation are not the result of the March 17, 2009, accident at work and, therefore,

¹⁵ ALJ Order (Dec. 17, 2009) at 2.

are not the result of an injury that arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 17, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Bart E. Eisfelder, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge